



MICHIGAN TROUT UNLIMITED

Dedicated to the Conservation, Protection and Restoration of Coldwater Fisheries & their Watersheds

Dear House Committee on Great Lakes & Environment:

Thank you for giving Michigan Trout Unlimited ("MITU") the opportunity to comment on the State's plan to turn over its Section 404 wetland protection program to the Army Corps of Engineers. MITU is an organization whose members are dedicated to the conservation of cold-water fisheries and the wetlands that support them. As Executive Director of MITU, I have provided comments to the legislature on numerous occasions and this issue is no less important.

Michigan wetlands - including those regulated by Section 404 of the Clean Water Act - are vitally important to the habitat of cold water fish species such as trout and salmon. Not only do they filter contaminants, they serve as the food store for these species.

Although we all can appreciate the difficult budgetary shortfalls affecting the State, the Governor's plan to return the Section 404 permitting process to the Corps of Engineers is concerning to our group for a couple of reasons.

Currently Michigan and New Jersey are the only 2 states with EPA approved 404 programs. Michigan's 404 program was initially approved by the EPA in October, 1984 and subsequently approved when Michigan updated its law in 1994. Michigan's unique and invaluable water resources and recreational activities surrounding them was one of the main reasons the State sought to implement the 404 Program. Because of this unique resource, it is important that we maintain local control of the Program. The other factor was the belief that a State program would be more timely and responsive to its citizens concerns. Turning the 404 Program to the Federal government would undermine those concerns.

Presently, Michigan law requires that 404 permits be issued within 90 days of submission of a completed application. On the other hand, neither the Federal Clean Water Act or the Army Corps of Engineers has a set time frame for issuing a permit. It is my understanding that decisions on permits in jurisdictions outside the Great Lakes region frequently take 12 to 18 months - and this is prior to the United States Supreme Court's landmark 2006 decision in *Rapanos v. United States*. It has been 2 years since the *Rapanos* decision and the Federal government is still trying to finalize guidance on how it will apply the *Rapanos* decision to 404 permit applications. The *Rapanos* case has caused even more delay in states where the Federal government operations the 404 Program. If Michigan were to give up its 404 Program, the concern is that the delay and confusion caused by the *Rapanos* case would foster "ill-will" in the regulated community which could prompt state legislators to relax wetland protections even further.

More importantly, the *Rapanos* decision severely undermined the Federal government's ability to protect wetlands governed by the 404 Program because it established two different tests for determining whether a wetland is protected under Section 404 of the Clean Water Act. The Scalia test requires a showing that the

wetland is directly connected to a "water of the United States." Where wetlands are adjacent to non-navigable waters of the United States, the government must, by relying on various scientific data, show that there is a substantial nexus between the wetland and the adjacent stream. As a biologist, I can tell you that the benefits of wetlands to cold water fisheries are well known and do not necessarily depend on legal definitions of "being directly or 'substantially' connected to a navigable bodies of water."

Another factor that should be considered is the 401 certification process. When deciding to issue a permit under section 401 of the Clean Water Act, the Federal government is required to obtain a certification from the State that the proposed filling activities will not adversely affect the water quality of the State. If Michigan turns over the 404 Program to the Federal government, any savings will be offset - at least partially - by the need to pay employees to review and consider each 401 permit application's effect on State water quality. Thus, before getting rid of the 404 Program, the State should determine if the former 404 Program resources will simply be diverted to the 401 certification process.

As Michigan faces great budgetary challenges, hard choices will be required. It is our belief however, that the decision to relinquish wetlands regulation to the federal government will be injurious to both environmental quality and to regulatory certainty and responsiveness – which could deter businesses from establishing themselves in Michigan. Citizens of Michigan cannot afford either of these right now – despite the short-term budgetary savings.

Thank you for your consideration,

A handwritten signature in black ink, reading "Bryan Burroughs". The signature is written in a cursive, flowing style.

Dr. Bryan Burroughs
Executive Director
Michigan Trout Unlimited
P.O Box 442
Dewitt, MI 48820-8820
www.michigantu.org